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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALLIED TUBE & CONDUIT CORPORATION,

Petitioner,

v.

INDIAN HEAD, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF TWENTY-FIVE STATES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTRODUCTION

The States of Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Hawaii, Iowa, Maine, Maryland, Michigan, Minnesota, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Washington, West Virginia and Wisconsin (hereinafter the "Amici States") submit this brief in support of Respondent Indian Head, Inc.'s position that the *Noerr-Pennington*[1] doctrine does not immunize anticompetitive activities by members

[1] *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965).

of private standard-setting organizations merely because the model codes they agree on are adopted in whole or in part by many state and local governments. The decision of the Second Circuit in *Indian Head, Inc. v. Allied Tube & Conduit Corp.*, 817 F.2d 938 (2d Cir. 1987) (*"Indian Head"*), should be affirmed.

INTEREST OF THE AMICI STATES

The Amici States have a vital interest in preventing an unwarranted expansion of the *Noerr-Pennington* doctrine for three reasons. First, the Attorneys General are the chief law officers of their states and are charged with the duty of enforcing the antitrust laws. In their capacity as *parens patriae*, they are authorized to bring federal antitrust actions on behalf of the citizens of their states.[2] The Attorneys General also represent their states and political subdivisions in federal antitrust actions for damages and injunctive relief, and are the primary public enforcers of the state antitrust laws, which are often interpreted in conformity with federal law. The States play a major role in antitrust enforcement and have a substantial interest in making sure that the antitrust laws are interpreted in accord with antitrust policy and the Supreme Court's prior decisions. Amici States have uncovered instances of antitrust violations by private standards-making associations and their members, have brought antitrust actions against such organizations,[3] and are currently

[2] 15 U.S.C. § 15c. *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439 (1945), (common law *parens patriae*.)

[3] *E.g., Arizona v. Maricopa Co. Medical Soc'y*, 457 U.S. 332 (1982); *State v. Colorado Springs Bd. of Realtors*, 692 P.2d 1055 (Colo. Dist. Ct. 1984;) *State v. Boulder Rental Property Ass'n*, 1982-83 Trade Cas. (CCH) ¶ 65,191-65,193 (Colo. Dist. Ct. 1980, 1981, 1983); *State v. Pikes Peak Towing Ass'n*, 1979-2 Trade Cas. (CCH) ¶ 62,985 (Colo. Dist. Ct. 1978, 1979); *State v. Colorado Certified Shorthand Reporters*, 1976-1 Trade Cas. (CCH) ¶ 60,685 (Colo. Dist. Ct. 1976); *State v. Professional Land Surveyors*, 1975-2 Trade Cas. (CCH) ¶ 60,633 (Colo. Dist. Ct. 1975); *State v. Iowa Optometric Ass'n*, 1983-2 Trade Cas. (CCH) ¶ 65,483 (Iowa Dist. Ct. 1983); *State v. Cedar Rapids Bd. of Realtors*, 1980-1 Trade Cas. (CCH) ¶ 63,713 (Iowa Dist. Ct. 1981); *New*

(Footnote Continued)

investigating standards-making behavior in other industries. Immunizing such activity would allow anticompetitive conspiracies within private standards-setting organizations to continue unchecked.

Second, the Attorneys General are representatives of government and have an interest in the integrity of the legislative process. Private associations are not governmental entities; they have no duty to protect the public interest, and they should not share the *Noerr-Pennington* antitrust immunity, which protects citizens' access to the political process.

Finally, the Attorneys General represent municipalities, counties, state agencies and other government entities that adopt and use standards, for example building and safety codes, that private contractors and builders are required to meet. The interest of the Attorneys General is to ensure that legitimate, reliable codes continue to be prepared for governmental entities to consider and adopt as they see fit. Continuing to apply the antitrust laws to private trade associations will not cause the demise of industry standard-setting but will ensure that the standards set are not tainted by conspiracies to restrain trade.

Approximately 420 private organizations issuing an estimated 32,000 sets of standards could be affected by the decision in this case.[4] A decision protecting the standard-setting activities of

York v. American Medical Ass'n, 1981-2 Trade Cas. (CCH) ¶ 64,195 (E.D.N.Y. 1981); *Ohio v. Joint Comm'n on Accredition of Hosps.*, No. C-2-79-1158 (S.D. Ohio 1979) (alleging that the Joint Commission restrained trade by failing to include non-physicians as part of the definition of hospital medical staff in the Commission's standards); *Arkansas Fuel Oil Co. v. State*, 154 Tex. 573, 280 S.W.2d 723 (1955) (adoption of codes of marketing refined petroleum products).

[4] National Bureau of Standards Special Pub. No. 681, *Standards Activities of Organizations in the United States* 1 (Aug. 1984). There is a marked upward trend in the number of private standards. Twenty years ago, there were "less than 14,000 nongovernment standards," in contrast to the estimated 32,000 private standards of the present. *Id.*

private associations of competitors from antitrust scrutiny would create an enormous loophole in antitrust law that would inevitably impede the States' efforts to preserve competition. A broad expansion of *Noerr-Pennington* immunity to trade associations would corrupt the standard-setting process, lessen the reliability and integrity of those standards to legislators and consumers, and ultimately end the pro-competitive benefits of legitimate model code organizations.

SUMMARY OF ARGUMENT

The antitrust laws prohibit industry and professional associations from conspiring to restrain trade when they make or enforce codes and standards. Such combinations in restraint of trade are subject to antitrust scrutiny even if they take the form of industry codes or standards that are subsequently adopted by government.

With the *Noerr-Pennington* doctrine, this Court carved out a limited exemption to antitrust scrutiny for concerted activity seeking to influence government. This exception was created in order to accommodate the First Amendment freedom of groups of individual and corporate citizens to petition government. When private industry associations act as standard-setting organizations, these important First Amendment considerations are not implicated. Therefore, the exception should not be expanded to include this activity.

Private associations like the NFPA are not arms of government. They are neither elected by, nor answerable to, the general public. Their concerns are the interests of the industries or professions they represent; governments, on the other hand, are presumed to act in the public interest and reflect a far broader community of concerns. Although the products of the deliberations of standard-setting associations may be adopted by government, such action does not transform private associations into governmental bodies.

Moreover, concerted activities to persuade private trade associations to adopt an anticompetitive code or standard are not "indirect petitioning" of the government for the purpose of

Noerr immunity. Allied's successful attempt to subvert NFPA's code-making clearly preceded consideration of the code by any government. Such antecedent conspiracies are not indirect lobbying of legislatures. Neither are such conspiracies "political speech," to which the antitrust laws would not apply, because they were not conducted in the "political arena" or designed to inform or convince the general public.

Private standard-setting associations, such as the NFPA, have served and can continue to serve important functions. Members of private associations may continue to confer and in good faith develop model codes or standards without running afoul of the antitrust laws. Extension of *Noerr-Pennington* immunity is not needed to permit private associations to promulgate legitimate codes and standards.

If, however, such groups of competitors are now held to be exempt from the antitrust laws and anticompetitive practices are permitted to subvert the code development process, the resulting codes may be less reliable and therefore less useful to governments and consumers. Ultimately, new competitors and products may be barred from the market by model codes designed to protect entrenched interests if antitrust immunity is extended to private standard-setting organizations.

ARGUMENT

I. THE *NOERR-PENNINGTON* DOCTRINE DOES NOT IMMUNIZE AGREEMENTS AMONG COMPETITORS WITHIN PRIVATE STANDARD-SETTING ORGANIZATIONS

A. *THE NOERR-PENNINGTON DOCTRINE WAS CREATED TO PROTECT THE RIGHT TO PETITION GOVERNMENT*

In a series of cases beginning with *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and including *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965), and *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1971), this Court articulated the principle that the antitrust laws do not apply to concerted solicitation of government action, although the action sought is anticompetitive, unless such action amounts to a mere sham. The Court in *Noerr* defined for the first time the relationship between the First Amendment right to petition and the Sherman Act. The railroads had conducted a deceptive publicity campaign directed against the trucking industry to encourage legislation that would hamper trucking. Justice Black, speaking for the Court, refused to "lightly impute to Congress an intent to invade [First Amendment] freedoms," 365 U.S. at 138, especially because the legislative history of the Sherman Act provided no basis for concluding that its purpose was "to regulate, not business activity, but political activity." *Id.* at 137. The Court held that an open, *public* campaign designed to influence the legislature would not violate the antitrust laws even though it had an anticompetitive effect.

In *Pennington*, the Supreme Court extended the doctrine to attempts to influence the executive branch. The Court held that *Noerr* protected the efforts of large mine owners and unions to increase the operating costs of small coal producers by persuading the Secretary of Labor to raise minimum wage levels. Justice White stated that: "[j]oint efforts to influence *public* officials do not violate the antitrust laws even though intended to eliminate competition." 381 U.S. at 670 (emphasis added).

Finally, in *California Motor Transport*, the Court applied *Noerr* to administrative and adjudicative proceedings. However, the Court held that the concerted opposition by a group of trucking companies to each and every license application made by their competitors regardless of the merits of the cases did not deserve *Noerr* immunity because it was a sham. In so holding, *California Motor Transport* made clear that *Noerr* rested squarely on First Amendment rights of petition and association. 404 U.S. at 510-12.

The *Noerr-Pennington* exemption, like other exemptions from the antitrust laws, should be construed narrowly. *Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 119, 126 (1982). When competitors act collusively within a private standard-setting association, they have no First Amendment right to violate the Sherman Act. *Giboney v. Superior Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949).[5] Because the conduct of private industry associations in setting standards does not implicate the important First Amendment considerations that gave rise to the *Noerr-Pennington* doctrine, the exception should not be expanded to include them.

B. *PRIVATE STANDARD-SETTING ORGANIZATIONS ARE NOT GOVERNMENTAL ENTITIES*

Amici States, as representatives of state and local governments, oppose Allied's attempt to usurp governmental authority for the purpose of sanitizing an illegal boycott. The NFPA, an association of competitors and other members, is not a "quasi-legislature." It is a *private* standard-setting organization and thus conspiracies to subvert its proper functioning may not be cloaked by the rationale of *Noerr* and the decisions that followed it.

The first issue for this Court is whether the NFPA is an arm of the government. In *Noerr*, this Court contrasted restraints of trade and monopolies created by "individuals or combinations

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[5] *See National Soc'y of Prof. Engineers v. United States*, 435 U.S. 679, 697-98 n.26 (1978) (First Amendment right of free speech and petition did not prohibit enforcement of injunction prohibiting anticompetitive provisions in an industry code).

of individuals or corporations," which are forbidden by the Sherman Act, with attempts "to persuade the legislature or the executive to take particular action with respect to law." 365 U.S. at 136. *California Motor Transport* further defined the scope of the *Noerr-Pennington* doctrine as "the approach of citizens or groups of them to administrative agencies (which are both creatures of the legislature, and arms of the executive) and to courts, the third branch of Government." 404 U.S. at 510. The NFPA is neither a creature of the legislature, an arm of the executive, nor a court. The NFPA is not the government, even though many governmental entities make use of its model code.

In this context, the concept of a governmental entity is to be construed narrowly. In *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), the Court held that *Noerr* did not apply to a private entity that acted as an agent of government. In that case, the Canadian government had appointed Union Carbide's subsidiary as its agent for purchasing vanadium for Canadian industry. The Court held that subjecting Union Carbide to liability "for eliminating a competitor from the Canadian market by exercise of the discretionary power conferred . . . by the Canadian government would effectuate the purposes of the Sherman Act and would not remotely infringe on any of the constitutionally protected freedoms spoken of in *Noerr*." *Id.* at 707-08.

Similarly, in *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961), this Court applied antitrust principles directly to the conduct of private standard setters. The American Gas Association, ("AGA"), issued seals of approval for gas burners, and induced "municipalities and government agencies to pass ordinances which require . . . the seal of approval by AGA", 273 F.2d 196, 199 (7th Cir. 1960). This Court held that a complaint alleging a conspiracy within a private trade association to exclude a competitor's product from the market stated a cause of action under the the antitrust laws.[6]

[6] The point is further illustrated by *United States v. Johns-Manville*, 259 F. Supp. 440 (E.D. Pa. 1966), where the court denied summary judgment with

(Footnote Continued)

Even entities that possess delegated authority to act as governments for some purposes may not exercise the incidents of sovereignty for every purpose. For example, in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), the State Bar Association exercised authority delegated to it by the legislature and therefore was a state agency for some purposes. The Virginia legislature had authorized the highest state court to regulate the practice of law, and that court adopted an ethical code, dealing in part with fees. *Id.* at 789. The State Bar, "a state agency by law argue[d] that in issuing fee schedule reports . . . it was merely implementing the fee provisions of the ethical code." *Id.* at 790. The Court reasoned that

> [t]he fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members . . . . The State Bar, by providing that deviation from County Bar minimum fees may lead to disciplinary action, has voluntarily joined in what is essentially a private anticompetitive activity, and in that posture cannot claim it is beyond the reach of the Sherman Act.

Id. at 791-92. *Accord, Feminist Women's Health Center, Inc. v. Mohammad*, 586 F.2d 530, 544-45 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979).

In the instant case, there was no grant or delegation of governmental status to the NFPA, so Allied cannot claim that the NFPA is an arm of government. Recognizing that, Allied instead asks this Court, by judicial fiat, to confer governmental status on the NFPA without regard to the fundamental differences between private and public entities.

A *private* standards organization prescribes rules for the regulation and restraint of interstate commerce without

respect to the defendants' activities before the private trade association, distinguishing between petitions for governmental action (within the *Noerr* doctrine) and concerted action to influence private standard-making bodies (outside *Noerr's* protection). *Id.* at 452-54.

governmental authority. *Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457, 465 (1941). Standard-setting organizations like NFPA that comprise competitors therefore pose a special threat to competition. This Court has previously warned that private standard-setting organizations like NFPA "can be rife with opportunities for anticompetitive activity" because the "less altruistic [members] . . . have an opportunity to harm their employers' competitors through manipulation of [the organizations'] codes." *American Society of Mechanical Engineers v. Hydrolevel Corp.*, 456 U.S. 556, 571 (1982). *See also* Hurwitz, *Abuse of Governmental Processes, the First Amendment, and the Boundaries of Noerr*, 74 Geo. L.J. 65, 91 (1985).

Private standard-setting associations cannot be deemed to be governments or even "quasi-governments" because they are not democratically elected or answerable to the public, are not subject to federal and state constitutional restraints imposed on government, and cannot be presumed to be acting in the public interest. There is no reason to exclude them from the antitrust scrutiny applicable to other private trade associations whose standards may not be adopted by government.

C. *ALLIED'S SUBVERSION OF THE NFPA PROCESS WAS NOT "INDIRECT PETITIONING" OF GOVERNMENT*

Conceding that NFPA is not an arm of the government, Allied argues that it and its co-conspirators were engaged in "indirect petitioning" of the government because many legislatures adopt, in whole or part, the codes promulgated by NFPA. As the facts demonstrate, the development of the NEC provision at issue here was a closed, largely industry-based activity that bears no resemblance to open democratic processes.

1. *NFPA'S Decision-Making Process Was Neither Open Nor Democratic*

Noerr clearly contrasts the railroads' open publicity campaign designed to secure legislation, which would adversely impact the trucking industry by changing general public opinion with regard to trucking, with:

> [C]ombinations normally held violative of the Sherman Act, combinations ordinarily characterized by an express or implied agreement or understanding that the *participants* will jointly give up their trade freedom, or *help one another take away the trade freedom of others* through the use of such devices as price-fixing agreements, boycotts, market-division agreements, and other similar arrangements.

365 U.S. at 136 (emphasis added). The latter combinations, including the conspiracy in this case, are not entitled to *Noerr* immunity.

The Court in *Noerr* further emphasized that "the contest itself appears to have been conducted along lines normally accepted in our political system," *id.* at 145, that is to say, through speech in a democratic forum open to all citizens. In general, "the more open and politically oriented the governmental proceeding, the more likely that private parties will be able to shield their activities . . . from antitrust attack". Hurwitz, *supra* p. 12, at 82.

In sharp contrast, Allied's conduct in this case involved nonpublic attempts to subvert a private largely industry-based group. Such conduct is akin to a traditional group boycott in which competitors conspire to deprive a rival of access to a lucrative market. *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. 207 (1959). Rather than an open debate on the merits of a product, addressed to officials with responsibility to society as a whole, Allied conspired with its competitors to exclude a new product from a market.[7]

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[7] Subjecting Allied's conduct to antitrust scrutiny would be consistent with numerous cases in which the courts have analyzed agreements concerning the setting and implementation of standards under traditional antitrust principles without hint of *Noerr* immunity.

The *per se* rule against price fixing agreements and horizontal boycotts has been applied to standard setting, *Radiant Burners v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961); *Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20 (1912); *United States v. American Radiator & Standard Sanitary Co.*, 433 F.2d 174 (3d Cir. 1970), *cert. denied*, 401 U.S. 948 (1971); *National Macaroni Mfrs. Ass'n. v. FTC*, 345 F.2d 421 (7th Cir. 1965); *C-O-Two Fire*

(Footnote Continued)

The argument that Allied's conduct was consistent with the rules and regulations of NFPA is irrelevant. Acts that do not violate a trade or professional association's rules may nevertheless be improper under the antitrust laws. *E.g., Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). Indeed, the fact that Allied could conduct such blatantly anticompetitive activities within the rules of a standard-setting association indicates that these organizations merit close scrutiny.[8]

2. *Private Conduct Although Later Adopted By The Government Is Not Immune From Antitrust Scrutiny.*

The judicial treatment of private restraints of trade, which a governmental entity later adopts, differs dramatically from treatment of conduct that merely seeks to persuade the government itself to restrain trade. The *Noerr-Pennington* doctrine protects only the latter. If members of a trade association advocate legislation adopting an anticompetitive practice, they are protected. However, there is no immunity for those who engage in a private restraint of trade, even if it may later be subject to governmental review. *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 601-02 (1976). Similarly, filing tariffs with a government

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Equip. Co. v. United States, 197 F.2d 489, 493-97 (9th Cir.), *cert. denied*, 344 U.S. 892 (1952); *Bond Crown & Cork Co. v. FTC*, 176 F.2d 974, 979-81 (4th Cir. 1949); *Fort Howard Paper Co. v. FTC*, 156 F.2d 899 (7th Cir. 1946); *Milk & Ice Cream Can Inst. v. FTC*, 152 F.2d 478 (7th Cir.), *cert. denied*, 329 U.S. 795 (1946).

Other arrangements have been reviewed under the Rule of Reason, *Consolidated Farmers Mut. Ins. Co. v. Anchor Sav. Ass'n.*, 1980-2 Trade Cas. (CCH) ¶ 63,530 (10th Cir. 1980), *aff'g* 480 F. Supp. 640 (D. Kan. 1979); *E.A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Comm'n*, 467 F.2d 178 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973); *Structural Laminates, Inc. v. Douglas Fir Plywood Ass'n*, 261 F. Supp. 154 (D. Or. 1966), *aff'd*, 399 F.2d 155 (9th Cir. 1968), *cert. denied*, 393 U.S. 1024 (1969); *Roofire Alarm Co. v. Royal Indem. Co.*, 202 F. Supp. 166 (E.D. Tenn. 1962), *aff'd mem.* 313 F.2d 635 (6th Cir.), *cert. denied*, 373 U.S. 949 (1963).

[8] Because the *Noerr* doctrine does not apply to activities within private standard-setting associations, the Court need not consider Petitioner's argument that its conduct does not fall within the "sham" exception to the *Noerr* doctrine.

agency does not confer immunity on the private conduct fixing the tariffs. *Litton v. American Telephone & Telegraph Co.*, 700 F.2d 785 (2d Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984).

Allied's vote-packing conduct within NFPA is clearly distinguishable from any legitimate petitioning of government. The widespread use of the NEC by governments as a technical resource does not convert actions within the NFPA into indirect lobbying of government. Allied's successful attempt to control NFPA code-making occurred in a closed non-political context, preceding any direct consideration of the code by the legislature. Such conduct does not rise to the level of governmental petitioning contemplated by the *Noerr-Pennington* doctrine.

II. THE SHERMAN ACT DOES NOT INFRINGE UPON LEGITIMATE STANDARD-SETTING ACTIVITIES

Limiting *Noerr* protection to actual petitioning of public officials advances the goals of the Sherman Act without impinging upon the First Amendment rights of private individuals or groups. Continued application of the antitrust laws to standard-setting organizations will serve to ensure the integrity of the codes that may ultimately be adopted by state and local governments.

A. *Application of the Sherman Act Will Not Chill the Promulgation of Model Codes*

Continued application of the antitrust laws to trade association standard-setting activities will not deter lawful participation by association members. Industry associations have powerful incentives to participate in developing codes, which are of vital interest to their members, and are unlikely to relinquish the practice. As the Court pointed out in *Hydrolevel*, associations derive substantial income and prestige from their codes:

> Although ASME may not operate for profit, it does derive benefits from its codes, including the fees the Society receives for its code-related publications and

> services, the prestige the codes bring to the Society, the influence they permit ASME to wield, and the aid the standards provide the profession of mechanical engineering.

456 U.S. at 576.

Unfettered debate within a trade association as to the propriety of a certain standard will not implicate the antitrust laws as long as the debate is not infected by collusion, vote-buying or any other arbitrary activity aimed at excluding a competitor from the market. *See Hydrolevel*, 456 U.S. at 577. Moreover, the antitrust laws will not prevent Allied and other companies from presenting its views to NFPA regarding their competitor's product, *id.*, or restrict Allied's right to petition state or local government directly as indeed Allied actually did, *Noerr*, 365 U.S. at 135-36.

B. *Application of the Noerr-Pennington Exemption Here Would Lead to Wholesale Circumvention of the Antitrust Laws*

Trade associations and their members have long been subject to the antitrust laws, *e.g.*, *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 106 S. Ct. 2009 (1986); *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982); *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978); *Radiant Burners v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961), and industry-produced model codes and standards have been developed consistent with the antitrust laws. In the context of *Noerr-Pennington* analysis, the Sherman Act and its policy must give way only to the exercise of the constitutional right to petition government. Extending the immunity, and thereby displacing antitrust scrutiny, would further neither the First Amendment nor the Sherman Act when, as in this case, genuine governmental petitioning is not involved. An antitrust exemption for standard-setting would stifle free competition and encourage all the ills the Sherman Act was designed to prevent. "The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower

prices, but also better goods and services." *National Society of Professional Engineers*, 435 U.S. at 695. *Accord, Indiana Federation of Dentists*, 476 U.S. at __, 106 S. Ct. at 2020. These valuable goals of the Sherman Act can be furthered without infringing on the First Amendment rights of trade association members to petition the government directly.

In addition, a holding that government adoption of trade association standards converts the standard-making process into *Noerr*-protected government petitioning would generate a myriad of line-drawing problems. How many legislatures, at what level of government, must enact the code? *Indian Head*, 817 F.2d at 944. Is adoption by one small township enough? Would the code-making process be protected where the code is adopted and not elsewhere? How will one weigh those communities which adopt only a portion of the code? These and other questions await the courts if a rule conferring antitrust immunity on standard-setting organizations whose codes are legislatively adopted is embraced.

The Ninth Circuit in *Sessions Tank Liners, Inc. v. Joor Manufacturing, Inc.*, 1987-2 Trade Cas. ¶ 67,692 (9th Cir.), *petition for cert. filed*, 56 U.S.L.W. 3356 (U.S. Oct. 27, 1987) (No. 87-687), faced with facts similar to those in this case, reached a conclusion contrary to the Second Circuit's decision, holding that efforts to influence a standard-setting association composed of public officials and private parties were immunized by *Noerr*. In so doing, the Ninth Circuit ignored this Court's prior treatment of standard-setting organizations and based its decision largely on the assumption that lobbying the association was the only way to lobby local governments. The Ninth Circuit applied the *Noerr-Pennington* immunity for three reasons. First, the court stated that "without a doubt" the company's actions before the association were "part of a plan to ultimately procure favorable legislation," in essence, direct lobbying to the government. *Id.* at 58,580. Next, the court decided that the association plays a "generally accepted role" in the governmental process, thereby making it a part of the government. *Id.* Finally, the court decided that all communications within the association context, even if their intent was to destroy competition, were protected because they were the same as political speech in the public arena. *Id.*

The Second Circuit in the instant case, facing identical issues, recognized that there is a real distinction between the government and private associations. The act of adopting codes, deciding legal cases or making administrative determinations is the essence of government and these actions have the force of law. Professional or trade associations, on the other hand, do not act in the political arena and their decisions do not carry the force of law. The former are properly immune from the Sherman Act, but the latter activities deserve no such immunity.

Reversal of the Second Circuit's decision in this case would transform trade associations into safe havens for future antitrust violators of all stripes. Private agreements in restraint of trade among horizontal competitors, wittingly or unwittingly ratified by trade association model code committees, may flourish if antitrust scrutiny is lifted. Activities condemned by a long line of Supreme Court and lower court cases may become fair game for competitors seeking to circumvent the antitrust laws. Such past abuses of the competitive system, conducted within the confines of trade and professional associations, have included price fixing, *Standard Sanitary Manufacturing Co. v. United States*, 226 U.S. 20 (1912); attempts to eliminate a competitor's product from the marketplace, *Hydrolevel* and *Radiant Burners;* other agreements to limit product lines, *United States v. American Radiator & Standard Sanitary Corp.*, 433 F.2d 174 (3d Cir. 1970), *cert. denied*, 401 U.S. 948 (1971); boycotts, *Indiana Federation of Dentists*; and agreements to restrain new product development and innovation, *United States v. Automobile Manufacturers Association*, 307 F. Supp. 617 (C.D. Cal. 1969). All of these cases involved private antitrust conspiracies, effectuated at least in part within the haven of a trade or professional association, which would be called into question if broad antitrust immunity were granted to private standard-setting organizations.

Without the discipline of antitrust scrutiny, trade associations will become mechanisms for sanctioning private anticompetitive conduct. The *Noerr* doctrine should not be extended to permit such a result.

CONCLUSION

The Second Circuit's decision should be affirmed.

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